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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CARLOS HENRIQUEZ, Defendant and Appellant.	E053060 (Super.Ct.No. SWF10001745) OPINION

APPEAL from the Superior Court of Riverside County. Dennis A. McConaghy, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed in part, reversed in part, and remanded with directions.

Kathleen M. Redmond, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Garrett Beaumont and Gil Gonzalez, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, defendant Carlos Henriquez was convicted of one count of selling a controlled substance (methamphetamine) in violation of Health and Safety Code section 11379, subdivision (a), and one count of possession of a controlled substance (methamphetamine) for sale in violation of Health and Safety Code section 11378. Defendant was placed on formal probation for a period of three years with various conditions, including that he serve 365 days in local custody. He appeals, contending the trial court erred in admitting his statements to the police and in imposing a booking fee (Gov. Code, § 29550)[1] without a hearing to determine his ability to pay.

I. FACTS

As a member of the Southwest Corridor Narcotics Task Force, Deputy Jeremy Harding of the Riverside County Sheriff's Department had obtained information that defendant and Gustavo Verdugo were involved in illegal narcotic activity. An investigation was started, including surveillance of the two individuals. Deputy Harding observed defendant and Verdugo driving around in a dark green Honda; however, prior to the commencement of the surveillance, they drove a red Saturn. Verdugo was usually the driver. Deputy Harding observed them engaging in counter-surveillance techniques, including quick U-turns, sudden stops, circling blocks, and "checking their tail." The two men also engaged in hand-to-hand transactions, including defendant approaching a car alone and making an exchange of an unknown item. However, they were never seen

[1] All further statutory references are to the Government Code unless otherwise indicated.

making a prolonged stop "at a location and stay[ing] for an amount of time consistent with full-time employment."

On July 22, 2010, the two men were observed in the green Honda getting onto Interstate 15 and exiting at Main Street in Lake Elsinore. They engaged in counter-surveillance driving techniques, and Glenn Warrington, a surveillance deputy, effected a stop. The deputies had previously obtained a search warrant for the car. As Deputy Warrington and his K-9 walked around the Honda, the K-9 alerted to the right front portion of the driver's door. Seven grams of methamphetamine, consistent with sales of the drug, were found. Defendant and Verdugo were arrested. Verdugo had $1,095 in his possession. Both were transported to Lincoln Avenue, where they lived with Stacey Johnson, Verdugo's girlfriend at that time. A search of the residence produced a clear bag of white crystalline substance (later confirmed to be a usable amount of methamphetamine) found inside a compact in Johnson's purse.

In an interview at the station, defendant waived his *Miranda*[2] rights. Deputy Harding spoke to defendant in Spanish. Defendant stated that both the Honda and the Saturn were registered in Verdugo's name but were actually his (defendant's); however, defendant did not have a driver's license.

In a separate room, Verdugo's interview was conducted in English. Verdugo admitted knowing about the methamphetamine in the Honda, stated that he and defendant were in a joint operation and had been involved in selling drugs together, and claimed

[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

they had a connection in Los Angeles where they obtained their supply of narcotics. Verdugo's primary job was to be the driver and defendant was the main dealer. They no longer had the Saturn because they had been stopped in that car by Lake Elsinore patrol, which made the car too "hot" to drive. Verdugo confirmed defendant's representations about the ownership of the cars. He explained that the two men originally worked for a construction company, but when they were laid off and out of work, they started selling methamphetamine because it was "a quick and easy way to make money." According to Verdugo, defendant was the leader of the operation and Verdugo was paid "a few hundred here, a few hundred there," for his work. Regarding the drugs found in Johnson's purse, Verdugo said he had arranged to sell an "8 ball" (3.5 grams of methamphetamine) to an unknown female, but when the deal fell through, Johnson took the drugs out of the car and put them in her purse, where they remained until found by the deputies.

Deputy Harding also searched a residence on Shallot Court where defendant and Verdugo had stopped while under surveillance. The owner of the home, Odilia Zecena, said she was in a relationship with defendant and he sometimes stayed with her. She stated that both defendant and Verdugo were involved in narcotics and "were possibly users." At trial, Zecena, who had married defendant, recanted her statements to the deputy.

Verdugo also testified at defendant's trial, recanting much of what he had previously said in his interview about ownership of the cars, why he drove defendant around, defendant's connection with the narcotics, and whether the two worked together

as a team selling methamphetamine. According to Verdugo, the deputies were "putting words in [his] mouth," and it was easy to go along with them because they told him they were going to help him with his case. Verdugo also denied that he said the Saturn was sold because it became hot.

Defendant testified on his own behalf. He claimed that he was never interviewed by Deputy Harding at the station but only questioned at his apartment complex. He admitted telling Deputy Harding that both of the cars belonged to Verdugo, but he denied ever driving the Honda. Defendant denied having any connections in Los Angeles, stating that he only went there with Verdugo because he played volleyball there on the weekends. Defendant had never seen Verdugo use narcotics but believed the drugs found in the Honda were Verdugo's because Johnson used drugs.

II. WAS DEFENDANT SUBJECTED TO A DELIBERATE, TWO-STEP INTERROGATION?

Defendant contends his statements regarding ownership of the Honda, in which the drugs were found, should have been excluded because they were the product of a deliberate, two-step interrogation, in violation of *Missouri v. Seibert* (2004) 542 U.S. 600 (*Seibert*).

A. Additional Background Facts

When Sheriff's deputies stopped and searched the Honda, which was driven by and registered to Verdugo, defendant was a passenger. Upon finding methamphetamine in the driver's side door, both Verdugo and defendant were arrested without *Miranda* warnings. However, prior to going to the police station after being arrested, Deputy

Harding questioned defendant regarding ownership of the car. Defendant said the car was his, even though it was registered to Verdugo. Later, at the station and after defendant had been read and waived his *Miranda* rights, he again said the car belonged to him.

Prior to trial, defense counsel sought to exclude defendant's statement that the car belonged to him on the grounds that defendant had not been advised of his *Miranda* rights prior to the questioning that first elicited the statement. In response, the People argued that the question as to who owned the car did not "fall within the two prong requirement of custodial interrogation," because the "purpose of asking that question, in addition to being part of [the] investigation, is to properly document the form that must be filled out before that car is towed." Denying the defense request, the trial court stated: "I think . . . the fact that you needed that information to have the car towed, and I think it's not investigative, as much as I liken it to DUI questions, [such as] [h]ow much have you had to drink? Where you been? Where are you going? [T]he same type, and getting the information about towing the drunk driver's car. I'm going to allow it."

B. Analysis

A statement obtained in violation of *Miranda* is itself not admissible. However, as long as the first statement was obtained neither through a deliberate violation of *Miranda* nor through coercive means, a subsequent *Mirandized* statement is generally admissible if it is itself voluntary. (*Oregon v. Elstad* (1985) 470 U.S. 298, 309, 318. If the first statement was actually the product of unconstitutional coercion, a second statement may be inadmissible even if *Miranda* warnings were given, if, under the totality of the

circumstances, the court concludes the second confession has been obtained by exploitation of the original illegality rather than in a manner that dissipates the taint. (*People v. McWhorter* (2009) 47 Cal.4th 318, 360.) Here, defendant contends his statement regarding the ownership of the car should not have been admitted, because the deputy engaged in a deliberate process of extracting the statement without reading defendant his rights and then confirming the statement after *Mirandizing* him. In *Seibert*, a plurality of the United States Supreme Court condemned that practice and held that the second confession is admissible only if, under the totality of the circumstances, the *Miranda* warning can be deemed truly effective in communicating to the suspect that he or she has "a genuine choice" about continuing to talk. (*Seibert*, *supra*, 542 U.S. at pp. 615-616 (plur. opn. of Souter, J.); see also *id.* at pp. 621-622 (conc. opn. of Kennedy, J.).)

In *Seibert*, the police intentionally withheld *Miranda* warnings in hopes of obtaining a confession. (*Seibert*, *supra*, 542 U.S. at p. 616.) A police officer awakened the defendant at 3:00 a.m., arrested her, and followed official instructions to not give her *Miranda* warnings. (*Seibert*, *supra*, at p. 604.) The officer took her to the police station, left her alone in the interview room for 15 to 20 minutes, and then questioned her without *Miranda* warnings for 30 to 40 minutes about a murder. (*Seibert*, *supra*, at pp. 604-605.) "[T]he questioning was systematic, exhaustive, and managed with psychological skill. When the police were finished there was little, if anything, of incriminating potential left unsaid." (*Id.* at p. 616.) After the defendant admitted the murder, she was given a 20-minute break. Then, the officer turned on a tape recorder, gave the defendant the *Miranda* warnings, and got her to repeat her confession a second time. (*Seibert*, *supra*, at

pp. 604-605.) At the suppression hearing, the officer testified that "he made a 'conscious decision' to withhold *Miranda* warnings, thus resorting to an interrogation technique he had been taught: question first, then give the warnings, and then repeat the question 'until I get the answer that she's already provided once.'" (*Seibert, supra*, at pp. 605-606.) The *Seibert* court found the second *Mirandized* confession inadmissible. (*Seibert, supra*, at p. 617.) It reasoned that the employment of a "question first and warn later" technique frustrated *Miranda*. (*Seibert, supra*, at pp. 611-612.) The police gave the defendant "the impression that the further questioning was a mere continuation of the earlier questions and responses," by referring back to the confession already given. (*Id.* at pp. 616-617.) The court noted: "It would have been reasonable to regard the two sessions as parts of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before." The *Miranda* warnings would not have "convey[ed] a message that [the defendant] retained a choice about continuing to talk." (*Seibert, supra,* at pp. 616-617, fn. omitted.)

As the People note, "*Seibert* is limited to situations where there is deception, coercion, and coordinated interrogation tactics designed to produce an unwarned confession. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 638-639.)" Such was not the case before this court. Here, there is no evidence that Deputy Harding deliberately withheld defendant's *Miranda* warning in order to undermine its effectiveness. As the deputy testified, he asked defendant, who owned the vehicle, "for the CHP 180 form, so we can notate who the owner of the vehicle is for recovery. And for the investigation, to see whom it belongs to, know who it belongs to." The trial court analogized the situation

to asking questions to someone stopped for a possible DUI. Moreover, unlike *Seibert*, there was nothing coercive about the questioning prior to defendant's initial statement.

In his reply brief, defendant cites the recent Supreme Court decision in *Bobby v. Dixon* (Nov. 7, 2011, No. 10-1540) ____ U.S. ____ [132 S.Ct. 26, 181 L.Ed.2d 328] (*Dixon*) and contends that the court's discussion is helpful because it points to particular facts that support a finding there was no two-step interrogation technique that undermined the effectiveness of *Miranda* warnings. In *Dixon*, the defendant and another murdered the victim by beating him and then burying him alive. (*Dixon, supra,* 132 S.Ct. at p. 27.) Dixon used the victim's information to obtain a state identification card in order to sell the victim's car. (*Ibid*.) The police had three encounters with Dixon. The second occurred when they arrested him for forging the victim's signature when cashing the check received for the sale of the victim's car. (*Id.* at p. 28.) The detectives interrogated Dixon for hours without providing *Miranda* warnings. Dixon admitted obtaining the identification card in the victim's name and signing the victim's name on the check; however, he claimed that he was ignorant of the victim's whereabouts. (*Dixon, supra,* at p. 28.) Even when the detectives told Dixon that his partner was providing more information on the victim's disappearance, Dixon continued to deny any knowledge. (*Ibid*.) Dixon was taken to a correctional facility, where he was booked on a forgery charge. (*Ibid*.)

After obtaining the relevant information from Dixon's partner, the police transported Dixon back to the station from the facility. Dixon admitted hearing that the victim's body was found. After learning that his partner was not in custody, Dixon stated

that he had talked to his attorney and wanted to tell the detectives what happened. After being read his *Miranda* rights and waiving them, Dixon confessed to murdering the victim. (*Dixon*, *supra*, 132 S.Ct. at p. 28.) At trial, Dixon's confession to forgery and murder were excluded. On appeal, the appellate court allowed the murder confession, and Dixon was convicted of murder, among other things. (*Id.* at pp. 28-29.) Dixon challenged his conviction, claiming his confession should not have been admitted. (*Id*. at p. 29.) When his appeal reached the United States Supreme Court, the justices distinguished the facts from those in *Seibert* and concluded there was "no two-step interrogation technique of the type . . . in *Seibert* . . . ." (*Dixon*, *supra*, at p. 31.) The court went on to state: "In *Seibert*, the suspect's first, unwarned interrogation left 'little, if anything, of incriminating potential left unsaid,' making it 'unnatural' not to 'repeat at the second stage what had been said before.' [Citation]. But in this case Dixon steadfastly maintained during his first, unwarned interrogation that he had '[n]othing whatsoever' to do with [the victim's] disappearance. [Citation.] Thus, unlike in *Seibert*, there is no concern here that police gave Dixon *Miranda* warnings and then led him to repeat an earlier murder confession, because there was no earlier confession to repeat. Indeed, Dixon *contradicted* his prior unwarned statements when he confessed to [the victim's] murder. Nor is there any evidence that police used Dixon's earlier admission to forgery to induce him to waive his right to silence later: Dixon declared his desire to tell police what happened to [the victim] before the second interrogation session even began. As the Ohio Supreme Court reasonably concluded, there was simply 'no nexus' between

Dixon's unwarned admission to forgery and his later, warned confession to murder. [Citation.]" (*Id.* at p. 31.)

Defendant contends that because the facts in this case are distinguishable from those in *Dixon,* this case must involve the improper use of the two-step interrogation technique. We disagree. For the reasons previously noted, we conclude that the court properly found that defendant's first statement did not taint his subsequent *Mirandized* statement given during the interview at the station.

III. ABILITY TO PAY HEARING

At sentencing, the trial court ordered defendant to pay a booking fee of $414.45 pursuant to section 29550[3] and listed it as a condition of probation. When imposing the fee, the court made no reference to the statute or any ability to pay. On appeal, defendant contends that "[b]ecause the [trial] court "never made the required finding that [defendant] had the ability to pay the fee and because there was no substantial evidence to support an implied finding, the booking fee must be vacated." In response, the People argue that defendant "forfeited the argument by not objecting below."

Section 29550, subdivision (c), in relevant part, provides that "Any county whose officer or agent arrests a person is entitled to recover from the arrested person a criminal justice administration fee for administrative costs it incurs in conjunction with the arrest if the person is convicted of any criminal offense related to the arrest, whether or not it is

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[3] "THE COURT: . . . As I said, all the other fines that are on the record, waive reading of them? I'm imposing all of them.

"THE DEFENDANT: Yes."

the offense for which the person was originally booked." Subdivision (d)(2) provides, "The court shall, *as a condition of probation*, order the convicted person, *based on his or her ability to pay*, to reimburse the county for the criminal justice administration fee, including applicable overhead costs." (Italics added.) Thus, "a prerequisite to the imposition of a booking fee . . . under Government Code section 29550, subdivision (c) . . . is a finding, whether express or implied, of the defendant's ability to pay. Such a finding must be supported by substantial evidence." (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1400.)

In view of the plain language of the statute, under section 29550, subdivision (d)(2), the trial court was required to determine defendant's ability to pay prior to imposing the fee. Because the trial court failed to make such determination, the order for defendant to pay booking fees is erroneous. While defendant urges us to vacate the booking fee, given the probation officer's report, which suggests defendant's ability to pay, we decline to do so. Instead, we will remand to the trial court for the limited purpose of determining defendant's ability to pay that fee.

IV. DISPOSITION

The judgment is reversed with respect to the booking fee of $414.45 imposed pursuant to section 29550, subdivisions (c) and (d)(2). The matter is remanded to the trial court with directions for the trial court to determine, in accordance with applicable

statutes, defendant's ability to pay the cost of the booking fee. In all other respects, the judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

MILLER
J.

CODRINGTON
J.